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Extraterritorial Application of the Human Rights to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict

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RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW

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6. Extraterritorial application of the human rights to life and personal liberty, including *habeas corpus*, during situations of armed conflict

*Robert K. Goldman**

1. INTRODUCTION

In the wake of the September 11, 2001 attacks in the United States, the US, with the assistance of its coalition partners – all parties to various human rights instruments – initiated the so-called 'war on terror' by invading Afghanistan, where their armed forces killed or captured hundreds of 'terrorist suspects'. Some of those detained were taken to the US military facility at Guantanamo Bay, Cuba, while others have languished in US custody in Afghanistan. These actions raise the question whether a State is bound by its human rights obligations when its agents operate outside of national territory. And, if so, how do those obligations interrelate with the State's other obligations under international humanitarian law when its counter-terrorism operations coincide with situations of armed conflict.

This chapter addresses these questions. In particular, it examines the extraterritorial reach of two fundamental human rights during two situations recognized in international law. These rights are the right to life and the right to liberty and the related procedural safeguard of *habeas corpus*. The two situations examined are: (1) international armed conflicts, including occupation; and (2) non-international armed conflicts. The paper surveys the jurisprudence on the extraterritorial application of the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (American Convention) and American Declaration of the Rights and Duties of Man (American Declaration), and the European Convention on Human Rights (European Convention), and the extent to which rights in these instruments can be derogated from. It also examines how the treaty bodies supervising these instruments view the relationship between international human rights law (HRL) and international humanitarian law (IHL) in situations of armed conflict. Relevant decisions of the International Court of Justice are also referenced in this connection. The chapter also identifies certain gaps in legal protection.

2. DEROGATION FROM HUMAN RIGHTS TREATIES

As a preliminary matter, it is worth recalling that the UN Security Council in 2001 made clear that any measure taken by States to combat terrorism must comply with all their obligations under international law, including HRL and IHL.[1] This injunction unambiguously requires that States respect both bodies of law while countering

terrorism, *whether at home or abroad*, and implicitly recognizes that upholding human rights and protecting the public from terrorist acts are not antithetical, but complementary, responsibilities of States.

When drafting the International Covenant on Civil and Political Rights (ICCPR) and various regional human rights instruments, States were aware of the need to strike a realistic balance between the requirements of national security and the protection of human rights. Accordingly, States included in these instruments provisions that permit them, when confronting an emergency situation – which may include actual or imminent terrorist violence, or armed conflict – to derogate from (suspend) certain rights in these instruments.

The ability of States to derogate from rights under these instruments, however, is *not* automatic in the face of such imminent terrorist violence or outbreak of armed conflict. Rather, it is governed by several conditions which are in turn regulated by the generally recognized principles of proportionality, necessity and non-discrimination. For example, Article 4 of the ICCPR sets forth the following procedural and substantive safeguards regarding the declaration and implementation of a state of emergency: the nature of the emergency must threaten the life of the nation; the existence of the emergency must be officially proclaimed; the measures adopted are strictly required by the exigencies of the situation; derogations cannot be incompatible with the derogating State's other obligations under international law; the derogation must not be discriminatory; and the derogating State must notify other State Parties through the UN Secretary-General of the provisions it has derogated from and the reasons for such derogation, as well as of the date the derogation has ceased to apply. Thus, a State that has not declared an emergency may not derogate from its human rights obligations, which remain fully in effect save for permissible limitations imposed on certain rights.

The key ground for derogation, that the emergency threatens the life of the nation, is especially relevant to some issues explored later in this chapter. That ground might well be satisfied by the existence of a large-scale internal armed conflict within or invasion of national territory by foreign armed forces, since these situations could entail a real threat to the political independence, territorial integrity and/or population of the country. It is questionable, however, whether this ground could be invoked by a State that is engaged in military operations, whatever their nature or origin, that occur exclusively in the territory of another State, particularly if that State's military cannot respond in kind.

While conceding States' ample discretion in adopting anti-terrorism measures, the ICCPR and other instruments also specify certain rights that may not be derogated from even during emergency situations. The list of non-derogable rights in the ICCPR is contained in article 4(2). These are, namely, right to life (article 6); prohibition of torture or cruel, inhuman or degrading treatment or punishment (article 7); prohibition of slavery, slave-trade and servitude (article 8 paragraphs 1 and 2); prohibition of retroactive criminal laws (article 15); the recognition of everyone as a person before the law (article 16); and freedom of thought, conscience and religion (article 18). Moreover, in 2001 the Human Rights Committee in its General Comment No. 29[2] indicated that the following provisions in the Covenant were not lawfully derogable during emergencies: the prohibition of hostage taking, abductions or unacknowledged detentions; and the prohibition of unlawful deportation or transfer of populations.

The jurisprudence of the Human Rights Committee and regional supervisory bodies indicates that derogations are always exceptional and temporary measures. Accordingly, such measures should be lifted as soon as the emergency which justified their imposition no longer exists or can be managed by less intrusive means under the relevant instrument.

3. EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS LAW

The Human Rights Committee (HRC), the European Court of Human Rights (ECtHR) and the former European Commission on Human Rights (ECHR), as well as the Inter-American Commission on Human Rights (IACommHR), have all found their respective instruments to apply extraterritorially, even in situations governed by IHL. These treaty bodies seem to agree that extraterritorial jurisdiction attaches in principle when a State exercises effective control over territory and/or persons.

3.1 International Covenant on Civil and Political Rights

The Committee's case law has long given extraterritorial effect to the ICCPR. In 1981, it found that Uruguay had violated the Covenant when its agents abducted in Argentina and Brazil several Uruguayan citizens who opposed that country's military regime.[3] The Committee reasoned that 'it would be unconscionable to so interpret the [state's] responsibility under article 2 of the Covenant as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate in its own territory'.[4]

The HRC's most complete statement of its views on the extraterritorial reach of the Covenant is found in its General Comment 31.[5] It observed therein that a State Party's duty to respect and ensure rights to all persons within their territory and subject to their jurisdiction includes

> … anyone within the power or effective control of the State Party, even if not situated in the territory of the State Party… This Principle also applies to those within the power or effective control of the forces of the State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peacekeeping or peace-enforcement operation.[6]

Additionally, the HRC has specifically affirmed the ICCPR's extraterritorial application to military and peacekeeping operations outside of the territory of the State concerned.[7]

Several States, most particularly Israel and the United States, have disputed the Committee's position on the Covenant's extraterritorial reach. However, the International Court of Justice in its 2004 Advisory Opinion on *the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*,[8] confirmed the Committee's views. After examining the Covenant's *travaux preparatoires* and the Committee's practice, the Court rejected the argument that the Covenant was not applicable outside of a State's territorial borders, and, more particularly, in occupied

territory. While recognizing that a State's jurisdiction is primarily territorial, the Court concluded that the Covenant's reach extends to 'acts done by a State in the exercise of its jurisdiction outside its own territory'.[9]

Accordingly, it would appear well settled that the ICCPR has a truly global reach, extending to any territory or person within the power or effective control of a party to that treaty.

3.2 The European Convention on Human Rights

The Strasbourg organs also have considerable case law affirming the extraterritorial scope of the European Convention. In 1975, the former ECHR addressed this issue in *Cyprus v. Turkey*,[10] in which Cyprus charged Turkey with violations of the Convention in that part of Cypriot territory invaded by Turkish armed forces. Turkey claimed that the Commission's competence was limited to the examination of acts committed by a contracting party in its own national territory, and that it had not extended its jurisdiction to any part of Cyprus. The Commission rejected this argument stating:

> In Article 1 of the Convention, the High Contracting Parties undertake to Secure the rights and freedoms defined in Section 1 to everyone 'within their jurisdiction' … The Commission finds that this term is not … equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language … and the object of this article, and from the purpose of the Convention as a whole that *the High contracting parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad* …[11]

This understanding of jurisdiction as a notion linked to authority and effective control, and not merely to territorial boundaries, has been confirmed in other cases decided by the former Commission and the ECtHR. In *Loizidou v. Turkey*,[12] the Court reaffirmed that the term jurisdiction in Article 1 was not limited to national territory, noting that 'responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory'.[13] The Court added that based on the Convention's object and purpose

> the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces or through a subordinate local administration.[14]

The Court has explained that any other finding

> would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violations of their rights in proceedings before the Court.[15]

In the *Bankovic*[16] case, the European Court appeared to depart from its previous case law. This case was brought against 17 European members of NATO for an air strike in 1999 which hit a communications facility in Belgrade, resulting in the deaths of applicants' relatives. In contrast to a situation of occupation, where a State can be regarded as exercising jurisdiction extraterritorially by virtue of its effective control over territory, the Court found no such jurisdictional link between the victims of the extraterritorial bombardment in question and the respondent States in this case. The Court noted that jurisdiction under Article 1 is primarily territorial and that it had only exceptionally recognized extraterritorial acts as constituting an exercise of jurisdiction.[17] Regarding whether its finding would defeat the '*ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights protection', the Court indicated that the Convention was meant to operate in an essentially regional context, that is, within the Council of Europe (COE), and not throughout the world, 'even in respect of the conduct of contracting states'.[18]

If the Court in *Bankovic* meant to limit jurisdiction under the Convention to the geographical confines of the COE, its subsequent judgments in the *Öcalan* and *Issa* cases appear to retreat from this view. In *Öcalan*,[19] the applicant was arrested by Turkish agents while he was aboard an aircraft in Kenya. The Court found that once the Kenyan authorities delivered Öcalan to Turkish officials he 'was under effective Turkish authority and therefore was brought within the "jurisdiction" of that state for the purpose of Article 1 of the Convention, even though Turkey exercised its authority outside its territory'.[20] The court distinguished the circumstances in this case from those in *Bankovic*, noting that Öcalan 'was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey'.[21]

The Court in *Issa*[22] again dealt with events taking place outside of the 'legal space' of the COE. The case was lodged by Iraqi nationals who charged that Turkish forces murdered their relatives during military operations in northern Iraq. While referring to *Bankovic*, the Court made clear that Contracting States 'may also be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully of unlawfully – in the latter State'.[23] Then, citing decisions of the HRC and the IACtHR, the Court added: 'Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate in its own territory'.[24] The Court then seemed to posit a new test at odds with *Bankovic* by stating that it did not exclude 'the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq'.[25] However, because the applicants failed to establish that Turkish troops were in the area where the victims were killed, the Court found that the victims were not within the 'jurisdiction' of Turkey.

More recently, the Court in the *Al-Skeini*[26] case further clarified its views on the extraterritorial reach of the European Convention. *Al-Skeini* involved the killing of five Iraqis by British troops in Basrah in Southern Iraq. The Law Lords, while acknowledging that the United Kingdom was an Occupying Power in Southern Iraq, nonetheless,

found that the Iraqi victims were not within the jurisdiction of the UK for purposes of the European Convention because British troops did not effectively control the area where the killings occurred. The European Court disagreed, holding that the UK had exercised jurisdiction over the victims at the time of their deaths. Referring to the general principle in its case law that a State's jurisdiction under Article 1 is primarily territorial, the Court reiterated in *Al-Skeini* that whenever a State's agents, including its military, exercise physical control and authority over an individual outside its territory, it is obliged under Article 1 to secure to that individual '… the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual'.[27] The Court also reaffirmed that another exception to the territorial principle occurs when a State, whether by lawful or unlawful military action, exercises effective control over an area outside of its national territory.[28] Importantly, the Court, citing *Issa*, *Öcalan* and *Al-Saadoon and Mufdhi v. the United Kingdom*,[29] made clear that jurisdiction under Article 1 of the Convention could exist outside the territory covered by COE Member States. Applying these principles, the Court pointedly noted that when the Iraqi victims were killed, the UK was an Occupying Power within the meaning of the Hague Regulations and had thereby 'assumed authority and responsibility for the maintenance of security in South East Iraq'. Accordingly, the Court found that in these 'exceptional circumstances', the UK had, through its soldiers' engagement in security operations in Basrah during the relevant period, 'exercised authority and control over the individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for purposes of Article 1 of the Convention'.[30]

Although the Court's jurisprudence on the extraterritorial reach of the European Convention is somewhat confusing, if not contradictory, it would appear, nonetheless, that a contracting party would be exercising jurisdiction when its agents (a) detain or exercise physical power and control over a person anywhere in the world, or (b) occupy or otherwise effectively control the territory of another COE Member State, or perhaps, as indicated in *Issa* and *Al-Skeini*, that of a non-Member State.

A contracting party, however, would incur no responsibility if its agents targeted and killed a person in another State whose territory, at the time, was not subject to its effective control. Unlike a detainee who is killed in custody, the person so attacked would be remediless under the Convention. This result creates a glaring and unseemly gap in legal protection. One remedy, proposed by Françoise Hampson, would be for the ECtHR not to look to control of territory as the test for determining whether the victim comes within the jurisdiction of the State launching the attack, but rather to 'control over the effects said to constitute a violation, subject to a foreseeable victim being foreseeably affected by the act'.[31]As she notes, such an approach would only go to the admissibility, not the merits of the complaint. Another solution would be to posit that the right to life's negative dimension, that is, the duty of States to refrain from violating that right, has acquired the status of customary international law and, as such, is binding on all States and their agents in all circumstances. Thus, overseas killings by State agents that are unlawful under IHL would violate customary HRL. Both approaches are plausible and merit further study.

3.3 The Inter-American Human Rights Instruments

The Inter-American Commission on Human Rights has similarly found that persons falling within a State's authority and control outside of national territory are effectively within that State's jurisdiction, and holders of enforceable rights under applicable instruments. Interestingly, virtually all of the case law to date on the subject has been made by the Commission and not by the Inter-American Court. This is because most cases have involved the United States, which has not ratified the American Convention and thus is bound by the American Declaration by virtue of its membership in the Organization of American States (OAS). Furthermore, most of these cases have involved claims arising from US military operations within the region.

The Commission's most complete statement concerning the American Declaration's extraterritorial reach is found in *Coard et al. v. United States*,[32] which involved the detention of 17 persons by US forces immediately following the US invasion of Grenada in October 1983. The Commission stated that:

> … under certain circumstances, the exercise of jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain … Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction.[33]

It added:

> While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of the person subject to its authority and control.[34]

The Commission similarly gave extraterritorial application to the American Convention in its recent admissibility decision[35] in the interstate complaint filed by Ecuador against Colombia for the killing of one of its citizens during a military operation by Colombian security forces against FARC rebels on Ecuadorian soil. Citing its own case law and the jurisprudence of other treaty bodies, the Commission concluded that Colombia had exercised jurisdiction over the area attacked and the victim in question. It specifically found the following factors essential for establishing jurisdiction:

> the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention's jurisdiction, it is necessary to determine whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual.[36]

The Commission also noted that during such time as its agents exercise such authority over persons abroad, the State is obliged to respect those persons' rights, particularly, the right to life and humane treatment.[37]

The Commission has also found a State extending its jurisdiction extraterritorially in circumstances not entailing its physical control of territory or custody of persons. Specifically, in *Alejandre et al.*[38] it held that Cuba had violated the right to life of four persons resulting from its agent's shooting down of two unarmed civilian aircraft in international airspace. The Commission found that, unlike the victims in *Bankovic*, the pilots of the doomed planes were under Cuba's 'authority' when its air force attacked them.[39] The Commission also relied on this notion of authority and control when in 2003 it adopted precautionary measures[40] requesting that the United States have a competent tribunal determine the legal status of the detainees at Guantanamo Bay, Cuba. The Commission in 1993 also declared admissible a case[41] arising out of the US invasion of Panama in 1989. In so doing, it simply stated:

> where it is asserted that a use of military force has resulted in non-combatant deaths, personal injury and property loss, the human rights of non-combatants are implicated … The case sets forth allegations cognizable within the framework of the [American] Declaration. Thus, the Commission is authorized to consider the subject matter of the case.[42]

A merits decision in the matter is still pending.

The Commission's case law to date suggests that it views the region's human rights system as applying solely within the geographic boundaries of the Western Hemisphere. This may explain why it has never opened a case or issued precautionary measures based on the petitions it has received since 2002 concerning the detention of persons in Iraq and Afghanistan who are under the control of US agents. As previously discussed, such detentions abroad by a party to the European Convention would constitute an exercise of jurisdiction, entitling the detainee(s) to the Convention's protections. However, in the *Saldaño* case,[43] in which it interpreted the scope of Article 1(1) of the American Convention, that treaty's jurisdictional clause, the Commission recognized that '… nationals of a state party to the American Convention are subject to that state's jurisdiction in certain respects when domiciled abroad or otherwise temporarily outside of their country or state and that state party must accord them when abroad the exercise of certain convention based rights'.[44] Thus, an OAS Member State whose agents kill or abduct one of its nationals outside of the hemisphere would be exercising jurisdiction over that person and incur responsibility under the American Convention for those illicit acts. The Commission's reasoning would apply equally to those OAS Member States bound only by the American Declaration. If the victim, however, were a non-national, the Commission could not entertain a claim based upon these same acts – which bespeaks of a clear gap in legal protection.

4. THE RELATIONSHIP BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

Before examining how the various treaty bodies view the relationship between HRL and IHL, it is instructive to consider the views of the International Court of Justice (ICJ) on this subject. The ICJ has made clear that HRL does not cease to apply during

armed conflict. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*[45] the Court stated the following regarding the right to life in the ICCPR:

> In principle, the right not arbitrarily to be deprived of one's life also applies in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[46]

The Court in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[47] confirmed this view, stating that it: '… considers that the protections offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the [ICCPR] …'.[48] Concerning the relationship between human rights and humanitarian law, it added: '… there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law'.[49] The Court, however, provided no guidance on how this *lex specialis* doctrine should apply in practice.

Human rights treaty bodies have no common approach on how HRL and IHL interrelate when State Parties are engaged in situations of armed conflict within their *own* territory, much less in hostilities *abroad*. For its part, the Human Rights Committee has yet to fashion a comprehensive theory on the subject. However, in its General Comment No. 31, the Committee stated:

> As implied in general comment 29, the Covenant applies to situations of armed conflict to which the rules of international humanitarian law are applicable, While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.[50]

This would suggest that where a rule of IHL is *lex specialis*, it does not as such derogate from the Covenant right, but rather must be consulted to determine whether that right has been violated.

The Inter-American Commission's case law most closely tracks the views of the ICJ. The Commission[51] has stated that human rights law is not displaced by IHL during armed conflicts and remains fully applicable save for permissible derogations. It has recognized, however, that the test for evaluating the observance of a particular human right during armed conflict may be distinct from that applicable in peacetime. The Commission, therefore, has looked to IHL rules as sources of authoritative guidance, or as the *lex specialis* in interpreting the American Convention and Declaration to resolve claimed violations of those instruments in combat situations.

In contrast, the European Court of Human Rights has to date not expressed an opinion on the relationship between these two bodies of law. Moreover, its consistent jurisprudence, applying essentially law enforcement rules to killings during armed conflicts, suggests that it does not regard IHL as *lex specialis* in such situations.

5. THE RIGHT TO LIFE

The right to life is the most fundamental right guaranteed in human rights law. Articles 6 and 4 of the ICCPR and the American Convention, respectively, prohibit the 'arbitrary' deprivation of life. This right, moreover, is not subject to derogation or limitations under either instrument. In contrast, Article 2 of the European Convention guarantees this right by prohibiting 'intentional' deprivations of life and stipulates the only circumstances when lethal force can lawfully be employed by State agents. Article 15 of the treaty provides an additional ground for use of deadly force in situations of armed conflict by permitting derogation from Article 2 for deaths resulting from 'lawful acts of war'.

This section examines the protection of this right in the following situations: (a) an extraterritorial situation of international armed conflict, including occupation, such as when the United States and its coalition partners invaded and subsequently occupied Iraq; and (b) an extraterritorial situation of non-international armed conflict, such as the current involvement of various NATO Member States in the ongoing internal hostilities in Afghanistan at the invitation of the Afghan government.

5.1 Situations of International Armed Conflict

Human rights treaty bodies have developed an extensive and basically similar jurisprudence on the duty of States to uphold the right to life by essentially employing a law enforcement paradigm that places limits on the use of lethal force by State agents. In principle, State agents may use lethal force only in situations where it is strictly unavoidable to protect themselves or others from imminent threat of death or serious injury, or to maintain law and order where strictly necessary and proportionate. In addition, the case law indicates that State agents should attempt to arrest rather than kill persons posing a threat, and should plan their operations accordingly.

In contrast, IHL, while placing restraints on the conduct of hostilities, permits deadly force to be used directly against combatants at all times until they have been captured or rendered *hors de combat*. Similarly, civilians lose their immunity from direct attack for such time as they directly participate in hostilities.[52] And, unlike HRL, IHL also does *not* require that an attempt be made to arrest or capture these persons before they are attacked.

If enemy combatants and civilians directly participating in hostilities may be lawfully attacked under IHL during international conflicts, how should their deaths be treated under human rights law? The answer might well turn on the particular treaty body's views on the interrelationship of HRL and IHL. Before addressing this issue, the treaty body would have to determine whether the invading State's human rights obligations apply in the country where the hostilities are underway. As previously noted, if the invaded country is outside of the geographic boundaries of the OAS or the COE, these regional bodies' respective instruments would not apply, and any complaint based on these deaths would be inadmissible. If, however, the invaded country were within one of these regions, the question then becomes whether the victims at the time they were killed were within the jurisdiction of the invading State.

The Inter-American Commission's case law would suggest that persons targeted and killed by the invading States' forces were subject to that State's authority.[53] On the merits, the Commission, which regards IHL as the *lex specialis*, should find that killings sanctioned by IHL would not constitute arbitrary deprivations of life under the American Declaration or Convention.[54]

Given the ICCPR's global reach, the location of the event is not critical; but, the Committee would have to decide whether the victims when attacked were within 'the power or effective control' of the invading State's forces. If it so determined, the thrust of General Comment 31 would suggest that the Committee would reach the same conclusion as the IACommHR, finding no violation of the right to life.

Resolution of these issues is more complicated under the European Convention for a variety of reasons. For example, assuming that the invaded country were a COE member, it is doubtful under the ECtHR's jurisprudence that the victims would be found subject to the jurisdiction of the invading State if that State's forces did not exercise effective control over the territory or the victims at the time of their deaths. And, even assuming that jurisdiction did attach, none of the grounds specified in Article 2 of the European Convention authorizing the use of deadly force, which are based on a law enforcement paradigm, could plausibly be invoked by the invading State. These deaths, for instance, could hardly be justified for the purpose of quelling a riot or insurrection. Because these deaths do not come within any of Article 2's exceptions, the invading State could derogate from Article 2 in respect of 'deaths resulting from lawful acts of war.' But, no European State has ever filed such a derogation under Article 15 based on its involvement in an extraterritorial international armed conflict. Moreover, as noted previously, it is questionable whether a State could claim that its engagement in a wholly extraterritorial armed conflict would constitute the kind of emergency that would justify its derogating from the European Convention. Furthermore, if such a derogation were invalid, then the only remaining option for the ECtHR would be to use IHL to interpret Article 2 so as to find that deaths resulting from lawful acts of war do not violate the right to life – something that the Court has shown little inclination to do.

5.2 Occupation

The jurisprudence of the treaty bodies surveyed indicates that human rights law applies during a situation of occupation, which is also governed by IHL rules. As the State Party to the treaty is obliged to respect the right to life in occupied territory, it is crucial to know when territory is occupied and what body of law – IHL or HRL – controls that determination. Professor Hampson notes that human rights treaty bodies have not had to 'define occupation or to determine whether the definition under human rights law is the same as that under IHL'.[55] She correctly states that 'If IHL is the *lex specialis* but human rights law remains applicable, a human rights body should presumably apply IHL to determine whether the situation is one of occupation'.[56]

In this regard, territory is considered occupied under IHL when it is actually placed under the authority of the hostile army, that is, organized resistance must have been overcome and the invading power has substituted its own authority for that of the legitimate government. Additionally, the occupation extends only to territory where

such authority has been established and can be exercised. As indicated, extraterritorial application of human rights treaties requires the State to exercise effective control over territory, which may well be coextensive with belligerent occupation. However, as one commentator observes,[57] the effective control test under human rights law may be broader and at times have a lower threshold than that for occupation under IHL. One example would be the *Illascu v. Moldova* case[58] where the ECtHR found Russia responsible for human rights violations in territory it controlled, but could not be said to occupy under IHL. Similarly, the IACommHR in *Coard*[59] found violations of the American Declaration, and actually invoked occupation law when the United States legally was not occupying Grenada.

Another important question is whether IHL or HRL rules govern the use of lethal force by the Occupying Power in occupied territory. The answer should depend on the nature of the occupation. In a relatively 'calm' occupation, the Occupying Power, consistent with its duty under IHL to ensure public order and safety, should operate under a law enforcement paradigm. Thus, its armed forces would have to attempt to arrest or capture criminal suspects before using deadly force against them, which would preclude, in principle, 'targeted killings' of suspected terrorists.[60]

If, however, there is an outbreak or resumption of hostilities in the occupied territory entailing military operations by the Occupying Power's forces against an organized resistance movement and/or the armed forced of the ousted government, then IHL rules should fully apply to the conduct of hostilities with opposing combatants being directly targetable on sight. The killing of civilians in the process of committing terrorist or other hostile acts, amounting to direct participation in hostilities, should also be deemed lawful under both IHL and HRL. Law enforcement rules, however, should continue to apply in connection with ordinary criminal activity not linked to the hostilities.

5.3 Situations of Non-international Armed Conflict

It is important to note that under this scenario State X's armed forces are *not* engaged in a non-international armed conflict (NIAC) within State X, but rather are assisting State Y's military to suppress an insurrection within State Y. While there is considerable case law on the application of human rights law in the former situation, there is virtually no jurisprudence, at least from human rights treaty bodies, on the extra-territorial application of human rights law in the latter situation. Moreover, many of the same threshold issues discussed in the international hostilities section would similarly be posed by State X's extraterritorial involvement in State Y's NIAC.

For example, neither the European Convention nor the Inter-American instruments would be applicable if the State Party were involved in a NIAC outside of the respective region's geographical boundaries. Thus, unlawful killings by State X's forces would not engage its responsibility under these instruments. And, even if State X's forces were fighting within another State Party's territory, the treaty body would still have to determine whether the victims, when killed, were within State X's jurisdiction. In addition, extraterritorial killings in a NIAC would not easily satisfy any of the grounds in Article 2 of the European Convention authorizing the use of deadly force. The permissible ground to quell an insurrection most certainly refers to actions taken

by the State Party within its *own* territory, not within that of another State involved in a NIAC. Furthermore, State X's involvement in State Y's NIAC arguably would provide no more justification for derogating from the European Convention than would its engagement in an overseas international armed conflict.

Assuming that the treaty body were seized with the matter, how should it treat killings that are lawful under IHL rules applicable in NIACs? More particularly, which law – IHL or HRL – should determine whether the use of deadly force was permissible? If the treaty bodies apply the same standards to determine the lawfulness of these extraterritorial killings as they would to killings by State agents in a NIAC at home, then they would probably reach different results.

The Inter-American Commission, based on its practice, would likely treat members of government armed forces and of organized armed groups as combatants and, as such, directly targetable, whether they are *on or away* from the battlefield. Moreover, it would apply IHL as *lex specialis* to determine the lawfulness of the killings under the American Declaration or Convention. In contrast, the Human Rights Committee[61] and especially the European Court[62] have applied law enforcement and not IHL rules to find violations of the right to life where State agents have directly targeted members of armed opposition groups *off* the battlefield. However, the Committee would probably find combat-related deaths that are lawful under IHL to not violate the ICCPR.

Whether the European Court would reach this same conclusion is unclear. The Court has taken into account various IHL principles in some recent Turkish[63] and Russian[64] cases involving clashes between governmental and armed opposition forces. However, it has never relied on IHL as *lex specialis* in assessing the legality of deaths arising out of such clashes, but instead has effectively applied HRL to make such determinations. By so doing, the Court risks finding killings that are lawful under IHL as violating the European Convention – a result which, it is submitted, could significantly undermine confidence in both IHL and HRL.

6. THE RIGHT TO LIBERTY AND *HABEAS CORPUS*

Articles 9 and 7 of the ICCPR and the American Convention, respectively, address the protection of personal liberty by prohibiting arbitrary arrest or detention. Article 5 of the European Convention takes a different approach by exhaustively listing the grounds for lawful arrest or detention. This section examines the protection of this basic right in (a) extraterritorial situations of international armed conflict, including occupation, and in (b) extraterritorial situations of non-international armed conflict.

6.1 Situations of International Armed Conflict

Human rights jurisprudence requires, *inter alia*, that any deprivation of liberty be based upon grounds and procedures established by law, that detainees be informed of the reasons for the detention and promptly notified of the charges against them in case of criminal detention, and that they be provided access to legal counsel. Prompt and effective oversight of detention by a judge or other officer authorized by law to exercise

judicial power must be ensured to verify the legality of detention and to protect other fundamental rights of the detainee.

The right to personal liberty applies during armed conflicts, except to the extent that it may be subject to lawful derogation. In this regard, the right to liberty is not included among the non-derogable rights in the ICCPR or the European or American Conventions. However, a State's ability to suspend this right has been strictly and narrowly defined by the treaty bodies. The Human Rights Committee, for instance, has indicated that in order to protect non-derogable rights, the right to *habeas corpus* must not be diminished by a State's decision to derogate from the Covenant.[65] The Inter-American Court has similarly found that *habeas corpus* and *amparo* cannot be derogated from during emergencies.[66] While never finding *habeas corpus* to be non-derogable, the ECtHR has ruled that deprivations of liberty without *habeas corpus* proceedings to review the decision to detain an individual violates article 5(4) of the European Convention.[67]

International Humanitarian Law permits the capture and detention of adversaries as a lawful incidence of war. During international armed conflicts, the Third and Fourth Geneva Conventions of 1949 contain provisions addressing the circumstances under which Prisoners of War (POWs) and civilians, respectively, may be interned or detained and the manner in which their internment/detention must be monitored, including access by the International Committee of the Red Cross (ICRC). The Third Convention (GC III) permits the internment of combatants as POWs until their repatriation at the cessation of active hostilities or the completion of any criminal proceedings or punishment for an indictable offense pending against a POW. The Fourth Convention (GC IV) permits the internment of civilians either in a party's own territory,[68] as well as in occupied territory (see below) provided certain conditions are met. Among them is that the person represents a serious security threat, that he or she has the right to request review of the internment decision, that such review is to be carried out by a court or administrative board and that it must be periodic (every six months).

In addition, persons detained/interned by a party to an international armed conflict and who do not benefit from more favorable treatment under the Geneva Conventions or Additional Protocol I (API) are entitled to certain *minimum* protections under Article 75, AP I, which reflects customary international law. Such persons would include civilians who directly participate in the hostilities, but who do not qualify as POWs under GC III or for protection under GC IV because of the nationality criteria stipulated therein.

Article 75 contains no provisions on permissible grounds for, or review of the lawfulness of detention. However, it stipulates that affected persons must be promptly informed of the reasons for their detention/internment and requires that they 'shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist'. Article 75's text thus suggests that detention/internment is an exceptional measure which should never be prolonged or indefinite. Moreover, Article 72, AP I makes clear that Article 75's minimum guarantees are supplemented by HRL.

Since IHL authorizes the detention of combatants during international armed conflicts, how should such detentions be treated under HRL? Must a State derogate from the right to personal liberty in order to lawfully detain persons in such conflicts?

And, do wartime detainees have a right to *habeas corpus*? There is little or no human rights jurisprudence on most of these questions. The Inter-American Commission more than any other treaty body has addressed or dealt with some of these issues.

The Commission has said that during international hostilities consideration must be given to IHL rules as the applicable *lex specialis* in interpreting and applying the right to personal liberty, 'with due regard to the overarching principles of necessity, proportionality, humanity and non-discrimination'.[69] Thus, the Commission would look to IHL to determine which grounds of deprivation of liberty are lawful during international hostilities. Since IHL permits the detention of enemy combatants in such hostilities, the Commission would find that such detentions do not constitute 'arbitrary' deprivations of liberty under the American Convention (or Declaration). Accordingly, there would be no need to derogate from Article 7 of the American Convention. Indeed, no OAS Member State has ever derogated from the Convention based on its involvement, whether at home or abroad, in an international armed conflict. Further, as noted in the previous section, any such derogation would be problematic in terms of satisfying the condition that there be an emergency threatening the life of the nation. And, due to the limited geographical reach of the American Convention and Declaration, detention of persons, other than of nationals, by a Member State outside of the Western hemisphere would not generate any State responsibility under either instrument.

As POWs are interned for reasons of military necessity, that is, to prevent them from returning to the battlefield, and not as criminal suspects, GC III does not afford them the procedural protections, including judicial review, that HRL provides to criminal suspects in peacetime. Thus, the IACommHR recognizes that POWs are not entitled 'to be informed of the reasons for their detention, to challenge the legality of their detention, or, in the absence of disciplinary or criminal proceedings, to be provided with access to legal counsel'.[70] While carving out this exception to regional doctrine on *habeas corpus*, the Commission has indicated that in uncertain or protracted situations of armed conflict and occupation, IHL rules and procedures governing detention/internment might prove 'inadequate' to safeguard the minimum human rights of detainees, including the right to personal liberty.[71] In which case, the Commission has indicated that the supervisory mechanisms and judicial guarantees under HRL and domestic law, including *habeas corpus*, 'may necessarily supercede international humanitarian law'.[72] This was precisely the rationale underlying the Commission's issuance of precautionary measures on behalf of the Guantanamo Bay detainees – all of whom were captured in the 2002 Afghan hostilities and disqualified, without individual status determinations, by the United States from protection under the Geneva Conventions.

In 2004, the US Supreme Court ruled in *Rasul v. Bush*[73] and again in 2008 in *Boumediene v. Bush*[74] that Guantanamo detainees only had the right to challenge the lawfulness of their detention in federal court through a *habeas corpus* petition based on the fact that the naval base is under legal and effective US control. Although the court never expressly referenced human rights law in either case, its rulings are broadly consistent with human rights jurisprudence concerning the non-suspendability of *habeas* relief during emergencies.

The Human Rights Committee has found that extraterritorial detentions constitute an exercise of jurisdiction under the ICCPR. However, it has never decided a case based on the applicability of IHL to wartime detentions under the Covenant. Walter Kälin, a former Committee member, does provide some insight into how the Committee might deal with this issue. He states that during armed conflicts 'IHL determines what is "arbitrary" in terms of Covenant rights protecting against arbitrary deprivations of a specific right' and concludes that a detention would not be arbitrary under Article 9 'if it is permitted by IHL which, as *lex specialis*, determines which grounds for deprivation of liberty are lawful in times of armed conflict'.[75] Accordingly, the Committee would likely reach this decision without regard to the question of derogation under the Covenant. Moreover, a derogation from Article 9 based on the State's involvement in a wholly extraterritorial armed conflict may not pass muster, for reasons previously explained.

Presumably, the Committee, like the IACommHR, would also find that POWs were not entitled to *habeas* relief, at least when IHL supervisory mechanisms were adequately functioning. Professor Kälin does, however, suggest that a right to periodic review of detention 'would seem possible and required to interpret a provision of Article 75, paragraph 3 [of] Additional Protocol I on the guarantees for persons detained for acts in relation to the armed conflict in light of Article 9 of the Covenant and to apply both provisions cumulatively'.[76] It is also arguable that such security detainees, by analogy to civilian internees under GC IV, should have a right to periodic review of the lawfulness of continued detention as a matter of customary international law.

The ECtHR in *Öcalan* also made clear that extraterritorial detentions entail the exercise of authority and control by the State over the detainee. Such detentions during *overseas* international armed conflicts pose many of the same problems as discussed previously. Again, none of the grounds listed in Article 5 of the European Convention could justify detaining combatants or civilians in such situations. Yet, the former European Commission found in *Cyprus v. Turkey* that since Turkey had not derogated from Article 5, its detention of Cypriot troops as POWs violated the Convention.[77] Professor Hampson terms this result 'absurd'.[78] She suggests that such a result could be avoided by the State's derogating to introduce additional grounds for detention permitted by IHL or by the Court's use of IHL as a matter of law.[79] Whether the State should or could derogate in these circumstances requires further study and analysis.

6.2 Occupation

Article 78, GC IV permits, as an exceptional measure, an Occupying Power 'for imperative reasons of security' to intern or place civilians in assigned residences. Such decisions must be made according to a 'regular procedure' which includes the right of detainees to have the decision appealed with the least possible delay, and, if upheld, subject to review 'if possible' every six months 'by a competent body' established by the Occupying Power. Jelena Pejic suggests that this appeal is essentially akin to a *habeas* action since its purpose '… is to enable the competent body to determine whether the person was deprived of liberty for valid reasons and to order his or her release if that was not the case'.[80] She also mentions that 'the authority that initially

deprived the person of liberty and the body authorized to conduct the review on appeal must not be the same if the right to petition is to be effective'.[81] Further, citing the Commentary to GC IV's requirement that the reviewing authority be independent and impartial, she argues that such a body must have authority to render final decisions on internment or release.[82] On a related issue, the International Tribunal for the Former Yugoslavia has determined that an initially lawful internment becomes unlawful if the detaining power does not respect a detainee's basic procedural rights and does not establish an appropriate review mechanism as required by Article 43 of GC IV.[83] The Tribunal's reasoning should similarly apply to detainees in occupied territory under Article 78.

The Inter-American Commission's decision in the *Coard* case essentially echoes these views. Although the United States did not legally occupy Grenada after it invaded the island in 2003, the IACommHR, nonetheless, invoked parts of occupation law in its analysis of the case. Specifically, it found Article 78, GC IV applicable and noted that it was generally consistent with the supervisory control required by the American Declaration's prohibition of arbitrary arrest.[84] While affirming that valid security reasons initially justified the United States' detention of petitioners, the Commission indicated that the same IHL rules which authorized this 'as an exceptional security measure' also required a regular procedure which permitted the detainees to be heard and to promptly appeal the decision. Such a procedure, which it suggested could be undertaken by a judicial or quasi-judicial body, 'ensures that the decision to maintain a person in detention does not rest with the agents who effectuated the deprivation of liberty, and ensures a minimal level of oversight by an entity with the authority to order release if warranted'.[85] It noted, moreover, that such supervisory control over detention is an 'essential rationale of the right of *habeas corpus*, a protection which is not susceptible to abrogation'.[86] Because petitioners were held for six to nine days after the end of hostilities without any such review, it found their detention violated the Declaration 'as understood with reference to Article 78 of the Fourth Geneva Convention'.[87]

The Human Rights Committee has dealt with detentions during a situation of occupation. For example, it has addressed Israel's detention of Palestinians from the Occupied Territories in connection with its derogation from Article 9 of the ICPR. In its Concluding Observations on Israel's second periodic report, the Committee recognized Israel's 'serious security concerns in the context of the present conflict', including suicide bombings associated with the second intifada, which led it to declare a state of emergency and derogate from Article 9 of the ICCPR.[88] Nonetheless, it expressed concern about Israel's use of various forms of administrative detention, restricting access to counsel and disclosure of full reasons for detentions. The Committee stated 'these features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 more extensively than what in the Committee's view is permissible pursuant to article 4'.[89] Presumably, the European Court would also find persons detained during an occupation entitled to a *habeas* or equivalent proceeding.

6.3 Situations of Non-international Armed Conflict

Although IHL applicable to NIACs envisions the detention of fighters and civilians for reasons related to the conflict, it contains no rules authorizing or regulating such detentions.[90] These are matters governed exclusively by domestic law and HRL. Thus, a State engaged in a NIAC can detain, try and punish insurgents consistent with its human rights obligations. If it instead wants to administratively detain or intern them, then it would have to derogate from the right to personal liberty, which would entail declaring an emergency. However, human rights jurisprudence, as indicated, would preclude it from suspending *habeas corpus* in such situations.

If that State requests other States to help it quell the insurrection within its territory, those States' legal authority to detain insurgents and other persons, unless stipulated otherwise in a legal arrangement, would not be based on their *domestic* laws, but that of the host State. Moreover, any such extraterritorial detentions would also constitute an exercise of jurisdiction under the ICCPR, the European Convention, and the American Convention or Declaration (if carried out in an OAS Member State). No human rights treaty body has yet ruled on the lawfulness of extraterritorial detentions in these particular circumstances. The Human Rights Committee and the IACommHR arguably would not find such detentions to be 'arbitrary' if they were lawful under the law of, and duly authorized by, the host State. However, such detentions do not on the surface satisfy any of the grounds for deprivation of liberty in Article 5 of the European Convention. And, any attempt by a COE State to derogate from that article based on its involvement in a purely extraterritorial NIAC would be questionable for reasons previously explained. Finally, any person detained, administratively or otherwise, by agents of the invited States should be entitled to file *habeas* or equivalent actions before the courts of the *host* State. US case law also suggests that the courts of the *detaining* country might also entertain such petitions.

7. CONCLUSION

In examining the extraterritorial application of two 'preferred' human rights, this paper has identified serious gaps in legal protection of the right to life under the European and Inter-American human rights systems, which should be remedied. It also has noted potentially significant problems with derogations from these rights based on a State's involvement in purely overseas armed conflicts. Its exploration of how treaty bodies deal with the relationship between IHL and HRL during armed conflicts has revealed major differences in approach, particularly the European Court's failure to use IHL to assess the legality of combat-related killings during armed conflicts. The chapter also points out the need to clarify whether human rights bodies should apply IHL or HRL to determine when territory is occupied, and which body of law should govern the use of deadly force in such situations. Finally, it notes that, with the exception of POWs and civilian internees under GC IV, all other persons deprived of liberty during emergency situations, including armed conflicts, should have, in principle, a right to challenge the lawfulness of his/her detention.

NOTES

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1. S/RES/1373, 28 September 2001.
2. General Comment No. 29: *States of Emergency (Article 4)*, HRC, 31 August 2000 (UN Doc. CCPR/C/21/Rev.1/Add.11).
3. *Lopez Burgos v. Uruguay*, HRC, 29 July 1981 (UN Doc. CCPR/C/13/D/52/1979) [hereinafter *Lopez Burgos* case]; *Celiberti v. Uruguay*, HRC, 29 July 1981 (UN Doc. CCPR/C/13/D/56/1979).
4. *Lopez Burgos* case, *supra* note 3, para. 12.3.
5. General Comment No. 31: *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, HRC, 26 May 2004 (UN Doc. CCPR/C/21/Rev.1/Add.13).
6. Ibid., para. 10.
7. See Concluding Observations on Israel, HRC, 21 August 2003 (UN Doc. CCPR/CO/78/ISR), para. 178 [hereinafter Concluding Observations on Israel].
8. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 [hereinafter *Wall* opinion].
9. Ibid., para. 111.
10. *Cyprus v. Turkey*, ECtHR, Application No. 6780/74 and 6950/75, Report of the ECHR adopted on 10 July 1976 [hereinafter *Cyprus v. Turkey*].
11. Ibid. (emphasis added).
12. *Loizidou v. Turkey*, ECtHR, Preliminary Objections, Judgment of 23 March 1995 [hereinafter *Loizidou* case].
13. Ibid., para. 62.
14. Ibid. (emphasis added).
15. *Cyprus v. Turkey*, *supra* note 10, para. 78.
16. *Bankovic and others v. Belgium and others*, ECtHR, Application No. 52207/99, Decision on Admissibility, 12 December 2001 [hereinafter *Bankovic* case].
17. Ibid., paras 61, 67.
18. Ibid., para. 80
19. *Öcalan v. Turkey*, ECtHR, Application No. 46221/99, Judgment of 12 March 2003 [hereinafter *Öcalan* case].
20. Ibid., para. 93.
21. Ibid.
22. *Issa and others v. Turkey*, ECtHR, Application No. 31821/96, Judgment of 16 November 2004 [hereinafter *Issa* case].
23. Ibid., para. 71.
24. Ibid.
25. Ibid., para. 74.
26. *Al-Skeini and Others v. United Kingdom,* ECtHR, Application No. 55721/07, Judgment of 7 July 2011.
27. The Court also noted that '[i]n this sense, therefore, the Convention rights can be "divided and tailored"'. Compare with *Bankovic and others v. Belgium and others*, ECtHR, Application No.52207/99, Decision on Admissibility, 12 December 2001.
28. Citing to *Cyprus v. Turkey*, the Court indicated that the controlling State has the responsibility 'under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified', *Cyprus v. Turkey*, ECommHR, Application No. 25781/94, ECHR 2001-IV, paras. 76–77.
29. *Al-Saadoon and Mufdhi v. the United Kingdom*, ECtHR, Application No. 61498/08, decision of 30 June 2009.
30. *Al-Skeini* case, *supra* note 26, para. 149.

31. F. Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body', *International Review of the Red Cross* 90 (2008): 594, at 570 [hereinafter *Hampson*].
32. *Coard et al. v. United States*, IACommHR, Case 10.951, Report No. 109/99, 29 September 1999 [hereinafter *Coard* case].
33. Ibid., para. 37.
34. Ibid.
35. *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia*, IACommHR, Admissibility, Case IP-02, Report No. 112/10, 21 October 2010.
36. Ibid., para. 99.
37. Ibid., para. 100.
38. *Alejandre et al. v. Cuba*, IACommHR, Case 11.589, Report No. 86/99, 29 September 1999.
39. Ibid., para. 25.
40. *Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba*, IAComm HR, Decision, 12 March 2002, International Legal Materials 41 (2002): 532.
41. *Salas v. United States*, IACommHR, Case 10.573, Report No. 31/93, 14 October 1993 [hereinafter *Salas* case].
42. Ibid., para. 6.
43. *Victor Saldaño v. Argentina*, IACommHR, Case 12.254, Report No. 38/99, 11 March 1999.
44. Ibid., para. 20.
45. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996.
46. Ibid., para. 25.
47. *Wall* opinion, *supra* note 8.
48. Ibid., para. 106.
49. Ibid., The Court confirmed this approach in *Case Concerning Armed Activities on the Territory of the Congo* (D.R. Congo v. Uganda), Judgment, I.C.J Reports 2005.
50. General Comment No. 31, *supra* note 5, para. 11.
51. See *Report on Terrorism and Human Rights* (2002), paras 57–62 [hereinafter *Terrorism* report].
52. See International Committee of the Red Cross, 'Interpretive Guidance on The Notion of Direct Participation in Hostilities under International Humanitarian Law' (2009), available at http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm
53. See *Salas* case, *supra* note 41.
54. *Juan Carlos Abella v. Argentina*, IACommHR, Case 11.137, Report No. 355/97, 18 November 1997.
55. Hampson, *supra* note 31, at 567.
56. Ibid.
57. C. Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', *Israel Law Review* 40 (2007): 310, 325.
58. *Illascu and others v. Russia, Moldova*, ECtHR, Application No. 48787/99, Judgment of 8 July 2004.
59. *Coard* case, *supra* note 32.
60. See Concluding Observations on Israel, *supra* note 7, at para. 15, in which the HRC expressed concern about Israel's targeted killings of suspected terrorists in the Occupied Territories. See also *The Public Committee against Torture in Israel et al. v. the Prime Minister of Israel et al.*, the Supreme Court of Israel sitting as High Court of Justice, Judgment of 14 December 2006.
61. *Guerrero v. Colombia*, HRC, 31 March 1982 (UN Doc. Supp. No. 40 (A/37/40)).
62. See, e.g., *Gül v. Turkey*, ECtHR, Application No. 22676/93, Judgment of 14 December 2000; *Ogur v. Turkey*, ECtHR, Application No. 21594/93, Judgment of 20 May 1999; *Güleç v. Turkey*, ECtHR, Application No. 21593/93, Judgment of 27 July 1998; *McCann and others v. United Kingdom*, ECtHR, Application No. 18984/91, Judgment of 27 September 1995.
63. See *Ahmet Özkan and others v. Turkey*, ECtHR, Application No. 21689/93, Judgment of April 2004; *Ergi v. Turkey*, ECtHR, Application No. 23818/94, Judgment of 28 July 1998.
64. See *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR, Application No. 57947/00, Judgment of 24 February 2004.
65. General Comment No. 29, *supra* note 2, para. 16.
66. *Judicial Guarantees in States of Emergency, Articles 27(2), 25 and 8 of the American Convention on Human Rights*, IACtHR, Advisory Opinion, 6 October 1987.
67. *Chahal v. United Kingdom*, ECtHR, Application No. 22414/93, Judgment of 15 November 1996.
68. See Fourth Geneva Convention, Articles 41–43.
69. *Terrorism* Report, *supra* note 51, para. 141.

70. Ibid., para. 142.
71. Ibid., para. 146.
72. Ibid.
73. *Rasul v. Bush*, 542 US 466 (2004).
74. *Boumedienne v. Bush*, 553 US 723 (2008).
75. W. Kälin, 'The Covenant on Civil and Political Rights and its Relationship with International Humanitarian Law' in University Center for International Humanitarian Law, Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict, available at http://www.ruig-gian.org/ressources/communication_colloque_rapport04.pdf?ID=256&FILE=/ressources/communication_colloque_rapport04.pdf (accessed 9 February 2012).
76. Ibid.
77. *Cyprus v. Turkey*, *supra* note 10.
78. Hampson, *supra* note 31, 565.
79. Ibid., 566.
80. J. Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence', *International Review of the Red Cross* 87 (2005): 375, 386.
81. Ibid.
82. Ibid., 387.
83. *Prosecutor v. Zejnil Delalic and others*, ICTY, Appeals Chamber, Judgment, 20 February 2001 (Case No. IT-96-21-A, para. 22).
84. *Coard* case, *supra* note 32, para. 55.
85. Ibid., para. 58.
86. Ibid., para. 55.
87. Ibid., para. 57.
88. Concluding Observations on Israel, *supra* note 7, para. 3.
89. Ibid., para.12.
90. But see J. Pejic and C. Droege's article in L.J. van den Herik and N.J. Schrijver (ed.), *Counter-terrorism and International Law; Meeting the Challenges* (forthcoming), indicating that 'both customary and treaty IHL contain an inherent power to intern and may thus be said to provide a legal basis for internment in NIAC'.